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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LEONEL ARROYO, Defendant and Appellant.	B219745 (Los Angeles County Super. Ct. No. KA083888)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert M. Martinez, Judge. Judgment affirmed as modified.

Edward Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews, Timothy M. Weiner and David Glassman, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Leonel Arroyo appeals from a judgment entered after a jury convicted him of count 1, the lesser included crime of kidnapping (Pen. Code,[1] § 207, subd. (a));[2] count 3, oral copulation of an unconscious person (§ 288a, subd. (f)); count 4, sodomy of an unconscious person (§ 286, subd. (f)); count 5, oral copulation of an unconscious person (§ 288a, subd. (f)); count 6, rape of an unconscious person (§ 261, subd. (a)(4)); count 7, rape of an unconscious person (§ 261, subd. (a)(4)); and count 8, the lesser included crime of assault (§ 240).[3] Appellant was acquitted of count 2, rape of an unconscious person (§ 261, subd. (a)(4)).

The trial court selected kidnapping, count 1, as the principal term and sentenced appellant to the midterm of five years on count 1. On counts 3, 4, 5, 6 and 7 the court imposed consecutive midterm sentences of two years each, and on count 8 a concurrent term of six months.

We modify the judgment to stay execution of sentence on count 8 and otherwise affirm.

CONTENTIONS

Appellant contends that: (1) the oral copulation convictions should be reversed because there was insufficient evidence of the corpus delicti; moreover, his conviction in violation of the corpus delicti rule deprived him of his federal constitutional right to due process; (2) the trial court erred in failing to instruct on reasonable and good faith belief in consciousness; moreover the failure to instruct on reasonable good faith belief in consciousness deprived him of due process; (3) the trial court erred in excluding limited

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Appellant was charged by information in count 1 with kidnapping to commit another crime. (§ 209, subd. (b)(1).)

[3] Appellant was charged by information in count 8 with assault by means likely to produce great bodily injury. (§ 245, subd. (a)(1).)

evidence of Jane Doe's[4] prior sexual history relevant to her credibility; moreover, the preclusion of evidence concerning those prior inconsistent statements deprived him of his federal constitutional rights to due process, confrontation, and trial by jury; (4) the prosecutor committed misconduct in closing argument, and if this court finds his prosecutorial misconduct claim forfeited then trial counsel was ineffective in failing to object below; (5) CALCRIM No. 220's definition of reasonable doubt violates due process by limiting reasonable doubt to the evidence presented at trial and by suggesting a weighing of evidence akin to the preponderance of evidence standard; (6) CALCRIM No. 220 deprives defendants of due process by failing to advise jurors that the prosecution has the burden of proving each element beyond a reasonable doubt; (7) cumulative error denied appellant his due process right to a fair trial; and (8) imposition of sentence on the kidnapping and assault counts violated section 654.

FACTS AND PROCEDURAL BACKGROUND

Viewing the whole record in the light most favorable to the judgment below as we must (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138–1139), the evidence established the following. On the evening of July 17, 2008, Doe, her sister Vanessa H., and Vanessa H.'s friends went to the Crazy Horse restaurant and nightclub in West Covina. Some of Doe's friends were also at the nightclub. Doe had several drinks.

When the club began to shut down around 1:30 a.m., Doe went outside to meet her sister by the car. She felt nauseated and vomited on the ground. Appellant parked his car next to her and asked if she needed help. Doe declined his offer to sit in his vehicle and sent a text message to her sister that said "I'm outside. Let's go." Her sister sent the reply: "Let me get the girls together. I'll be there." Appellant then punched Doe in the side of the head and she fell on the ground. Appellant continued to punch her in the face, mouth, eyes and head. Appellant then picked her up and put her in his car.

Doe's sister and friends could not find Doe in the parking lot but saw the vomit on the ground. They were unsuccessful in reaching her by text. When a security guard told

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[4] We refer to the victim throughout as Jane Doe to protect her privacy.

Vanessa H. that Doe had left, she thought that Doe had left the bar with her friends. Vanessa H. sent Doe a text message reading: "Please make sure they take you home." Vanessa H. returned home.

After appellant put Doe in his car, she fell forward onto the center console. She lost consciousness and woke briefly to notice that they were parked in front of a motel. She lost consciousness again and woke to find herself inside a motel room with appellant raping her. Doe asked him to stop, but he did not. She then lost consciousness. Doe woke the next morning to find herself and appellant naked in bed. There was blood on the sheets. Her hands were bloody and her face hurt. She could not see out of one eye. In the mirror she could see that she had been beaten. When Doe asked appellant how she got there, he said he did not know. When she asked about her bloody face he told her that he found her like that. Appellant gave several different answers when she asked him his name. When Doe came out of the bathroom she threw a bloody rag on the bed. Appellant grabbed it and said, "Oh, that would look bad."

Appellant and Doe walked out of the motel room. Appellant agreed to drive Doe home. Doe noticed that blood was all over the seats, the dashboard, the door, and the center console. At her direction, appellant dropped her off a block away from her house. Doe testified that appellant's license plate read "Arroyo # 1."

Doe walked into her house and the backyard where she saw her mother. She told her mother and later her sister that she thought she had been raped. Doe's family called the police.

Dawn Henry, a registered nurse and sexual assault forensic examiner, conducted a sexual assault examination of Doe. Doe's mouth was swollen, bruised and red, and her lip was split inside. Her left eye was red, grossly swollen and bruised. There was also redness, bruising and tenderness on the left side of her nose and in the area of her right eye. There was redness, bruising and tenderness behind Doe's right ear. Doe also had sustained anal tears, bruising to the anal area and abrasions to the lower part of the entry to the vagina.

Doe informed West Covina Police Department Detective Tyler Kennedy of appellant's license plate number, which he used to locate appellant. Doe identified appellant as her attacker from a photographic lineup shown to her by Detective Kennedy.

On July 18, 2008, appellant brought his car to a car wash. An employee of the car wash noticed that there were blood stains on the front passenger seat. Later that same day, police officers went to appellant's residence in Corona where they impounded appellant's vehicle and arrested him. Stains on the front passenger seat, floorboard, and door were later determined to be blood. Police officers found blood and vomit on the ground in the parking lot of the Crazy Horse restaurant. Detective Kennedy interviewed appellant after he waived his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436. Appellant told Detective Kennedy that he had drinks with coworkers at the Crazy Horse restaurant, then met Doe as she was walking out to the parking lot. Although appellant said they discussed going to her house to have sex, he was unable to tell Detective Kennedy where she lived. Appellant said they then drove around and parked for the night because they could not find her house. They kissed a little bit, then fell asleep. The next morning, he drove Doe home. When Detective Kennedy asked appellant if he had taken his car to a car wash, he admitted he had done so. He stated there were three drops of blood on his seat from Doe who had told him she was finishing her menstrual period. When Detective Kennedy asked appellant why he thought he had been arrested, appellant replied, "I must have done something wrong."

Upon being questioned further, appellant admitted that he and Doe had gone to two different motels. Appellant said that because she had passed out, he left her in the car to check into a motel. He had to wake her up to get her into the room. He wanted to clean her up and then take her home later. He stated that she took a shower, then came out of the bathroom wearing only a towel and panties. She lay on the bed and he began to rub her back. He then admitted to having sex with her. He said, "I think it was consensual sex." He stated that he performed oral sex on Doe, then engaged in vaginal intercourse. They also engaged in anal sex. Appellant was not wearing a condom. They

then fell asleep. Appellant stated that when they woke up, he performed oral sex on her again, then engaged in sexual intercourse. They fell asleep again. Appellant said "Man, I probably did something to her."

When asked why he went to the motel to clean Doe up, appellant said Doe had blood and vomit coming from her nose, a swollen lip, and her eye was beginning to swell. He also stated that at the Crazy Horse restaurant, he had to "kind of push [Doe] up with his shoulder to get her into the car." Appellant's middle finger and ring finger on his right hand were swollen. His left ring finger looked scratched and a little swollen.

DISCUSSION

I. Sufficient evidence established the corpus delicti of oral copulation of an unconscious person

Appellant contends that insufficient evidence was presented of corpus delicti to support his conviction on counts 3 and 5, oral copulation of an unconscious person. The People contend that appellant has forfeited this argument by failing to object below. We find that appellant has not forfeited his argument on appeal and that sufficient evidence established the corpus delicti of oral copulation of an unconscious person.

The theory of corpus delicti is outlined as follows. "In every criminal trial, the prosecution must prove the corpus delicti, or the body of the crime itself—i.e., the fact of injury, loss, or harm, and the existence of a criminal agency as its cause. In California, it has traditionally been held, the prosecution cannot satisfy this burden by relying *exclusively* upon the extrajudicial statements, confessions, or admissions of the defendant. [Citations.]" (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1168–1169 (*Alvarez*).) "The independent proof may be circumstantial and need not be beyond a reasonable doubt, but is sufficient if it permits an inference of criminal conduct, even if a noncriminal explanation is also plausible. [Citations.] There is no requirement of independent evidence 'of every physical act constituting an element of an offense,' so long as there is some slight or prima facie showing of injury, loss, or harm by a criminal agency. [Citation.] In every case, once the necessary quantum of independent evidence

is present, the defendant's extrajudicial statements may then be considered for their full value to strengthen the case on all issues. [Citations.]" (*Id.* at p. 1171.)

Initially, we do not agree with the People's argument that appellant forfeited his right to appeal by failing to object below on the ground of the corpus delicti rule. The defendant, on appeal, may directly attack the sufficiency of the prosecution's independent showing of the corpus delicti. (*Alvarez, supra*, 27 Cal.4th at p. 1180 [despite cases holding defendant forfeited appeal based on corpus delicti rule because he failed to object at trial to admissibility of evidence, there no longer exists a trial objection to the admission in evidence of the defendant's out-of-court statements on grounds that independent proof of the corpus delicti is lacking].)

Next, we are satisfied that there was sufficient independent evidence that appellant engaged in acts of oral copulation with Doe. As previously stated, the independent evidence may be circumstantial, need not be beyond a reasonable doubt, and may be slight. (*People v. Wright* (1990) 52 Cal.3d 367, 405 [disapproved on other grounds as stated in *People v. Williams* (2010) 49 Cal.4th 405, 459].) Thus, in *People v. Jennings* (1991) 53 Cal.3d 334, 364, our Supreme Court held there was sufficient minimal evidence of rape to satisfy the corpus delicti rule where the victim's severely decomposed, naked body showed no evidence of seminal fluid, penetration, or rape, but did show that her jaw had been broken. The court held that "[W]hen the body of a young woman is found unclothed in a remote locale, an inference arises that some sexual activity occurred, thus satisfying the requirement that there be some showing of a loss, injury, or harm." (*Id*. at p. 367.)

Here, Henry testified that Doe had suffered vaginal abrasions, anal tears, and bruises to her face. Doe told her mother and sister that she believed she had been raped. Indeed, Doe woke up in the motel room at one point to find appellant raping her. Also, it is reasonable to infer that appellant performed oral copulation on Doe during the course of the prolonged rape. Though the evidence did not preclude other forms of sexual assault, it was sufficient to establish the corpus delicti of forcible oral copulation. Thus,

appellant's further claim that he was deprived of his federal constitutional right to due process because the state corpus delicti rule was arbitrarily violated, must fail.

II. The trial court did not err in failing to instruct with a modified version of CALCRIM No. 1003

Appellant contends that the trial court should have instructed the jury with a modified version of CALCRIM No. 1003 that would have given the jury the option of finding that Doe's conduct led appellant to reasonably and in good faith believe she was conscious.[5] We find that appellant forfeited his right to raise the issue on appeal. In any event, the trial court had no duty to give the modified instruction; and even if the instruction should have been given, failure to do so was harmless error. We also find unavailing appellant's further argument that he was deprived of due process under the federal Constitution because the failure to modify CALCRIM No. 1003 resulted in the omission of complete instructions on an element of the offense.

We first note that appellant's failure to request such a clarifying instruction at trial forfeits his claim on appeal. A trial court has a duty to sua sponte instruct on the general principles of law relevant to and governing the case. (*People v. Rubalcava* (2000) 23 Cal.4th 322, 334.) A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language. (*People v. Hart* (1999) 20 Cal.4th 546, 622.) The jury was instructed with CALCRIM No. 251 that the crimes charged in counts 2 through 7 required proof of his knowledge of Doe's unconsciousness. The jury was also instructed with CALCRIM Nos. 1003, 1018, and 1033 which informed the jury that it was required to find beyond a reasonable doubt that appellant knew that

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5 Appellant claims the trial court should have instructed the jury as follows: "The defendant is not guilty of this crime if he actually and reasonably believed that the woman was conscious and capable of consenting to sexual intercourse, even if that belief was wrong. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the woman was conscious. If the People have not met this burden, you must find the defendant not guilty."

Doe was unable to resist because she was unconscious. At trial, appellant failed to request the modified instruction and therefore has forfeited his challenge on appeal.

In any event, the evidence does not support such an instruction because the evidence tended to show that appellant knew Doe was unconscious when he committed the sexual assaults on her. Doe went out to the parking lot feeling sick and vomited by her sister's car. Appellant then beat her into unconsciousness before driving her to a motel. Doe woke up to find him raping her. When Doe looked in the mirror, she saw that she had been badly beaten and could barely see out of one eye. Henry's examination confirmed that Doe had sustained bruises and lacerations to her head, neck and eye, hardly evidence of consensual sex. Thus, the evidence tended to show that he committed rape, sodomy, and oral copulation on her while she was unconscious. We do not find persuasive appellant's argument that the evidence supported a reasonable belief defense because the medical evidence was ambiguous, there was a lack of evidence confirming Doe's testimony that she was unconscious, and Doe might have engaged in sexual activity while in an alcoholic blackout. Appellant's statement to the police that Doe consented to sexual intercourse is the only evidence, however incredible, that might support the giving of the instruction.

But, even if the evidence supported the instruction, the trial court's failure to give it was harmless error. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Russell* (2006) 144 Cal.App.4th 1415, 1431 [error in failing to instruct on a mistake of fact offenses subject to the harmless error test].) The jury was instructed with CALCRIM No. 251, that "[t]he crimes charged in counts 2, 3, 4, 5, 6, and 7 require proof of the [appellant's] knowledge of the complaining party's unconsciousness at the time of the act." The jury was also instructed with CALCRIM No. 1003, which required it to find that appellant "knew that the woman was unable to resist because she was unconscious of the nature of the act." Therefore, the prosecutor was required to prove that appellant knew Doe was unconscious.

We also reject appellant's further argument that he was deprived of due process under the federal Constitution because the failure to modify CALCRIM No. 1003 resulted in the omission of complete instructions on an element of the offense. CALCRIM No. 1003 as given stated: "The defendant is charged in Counts 2, 6 and 7 with raping a woman who was unconscious of the nature of the act in violation of 261(a)(4). [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant had sexual intercourse with a woman; [¶] 2. He and the woman were not married to each other at the time of the intercourse; [¶] 3. The woman was unable to resist because she was unconscious of the nature of the act; [¶] AND [¶] 4. The defendant knew that the woman was unable to resist because she was unconscious of the nature of the act. [¶] Sexual intercourse means any penetration, no matter how slight, of the vagina or genitalia by the penis. Ejaculation is not required. [¶] A woman is unconscious of the nature of the act if she is unconscious or asleep or not aware that the act is occurring."

Thus, CALCRIM No. 1003 instructed the jury on all the elements of section 261, subdivision (a)(4), which provides: "Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances: (4) Where a person is at the time unconscious of the nature of the act, and this is known to the accused. As used in this paragraph, 'unconscious of the nature of the act' means incapable of resisting because the victim meets one of the following conditions: (A) Was unconscious or asleep."

We are satisfied that no instructional error occurred.

III. The trial court properly excluded evidence of Doe's prior sexual conduct

Appellant contends the trial court abused its discretion in refusing to admit evidence of Doe's prior sexual conduct. We disagree and find any error was harmless.

"Evidence Code section 1103, subdivision (c), provides that a defendant cannot introduce opinion evidence, reputation evidence, and evidence of specific instances of the alleged victim's previous sexual conduct with persons other than the defendant to prove

the victim *consented* to the sexual acts alleged." (*People v. Chandler* (1997) 56 Cal.App.4th 703, 707 (*Chandler*).) "Evidence Code section 1103, subdivision (c)(4), allows the admission of evidence of prior sexual history relevant to the credibility of the victim." (*Ibid*.) "Because the victim's credibility is almost always at issue in sexual assault cases, Evidence Code section 782 specifies a procedure requiring an in camera review of the proffered evidence to diminish the potential abuse of section 1103, subdivision (c)(4). The defense may offer evidence of the victim's sexual conduct to attack the victim's credibility if the trial judge concludes following the hearing that the prejudicial and other effects enumerated in Evidence Code section 352 are substantially outweighed by the probative value of the impeaching evidence." (*Id*. at pp. 707–708, fn. omitted.) The credibility exception has been used sparingly, most often in cases where the victim's prior sexual history is one of prostitution. (*Id*. at p. 708.) "A trial court's ruling on the admissibility of prior sexual conduct will be overturned on appeal only if appellant can show an abuse of discretion." (*Id*. at p. 711.)

We find *Chandler, supra*, 56 Cal.App.4th at page 711 to be instructive. In that case, the Court of Appeal found that the trial court did not abuse its discretion in refusing to admit evidence of the victim's willingness to exchange sex for drugs during a long-term sexual relationship. (*Ibid*.) The court held that the exchange of favors in a long-term relationship had little or no bearing on the victim's willingness to exchange sex for drugs on a routine basis. (*Ibid*.) Here, the trial court refused to admit into evidence statements made by Doe regarding her prior sexual history. Specifically, appellant's trial counsel sought to ask her about inconsistent statements she had made to two detectives regarding her previous experience with anal sex. On being questioned by the trial court, appellant's trial counsel represented that the inconsistent statements were not being offered to establish consent but were relevant to Doe's credibility. The trial court noted that Doe had been impeached based on various other inconsistent statements (such as the number of drinks she had consumed) and concluded that the statements were more prejudicial than probative. The trial court concluded, and we agree, that the evidence of

inconsistent statements regarding Doe's history with respect to anal sex would have had little evidentiary value but would have been extremely prejudicial.

We are satisfied that the trial court did not abuse its discretion in refusing to admit the evidence of Doe's inconsistent statement regarding her sexual history.

Even if the trial court had erred in refusing to admit the statements, it was harmless because it is not reasonably probable the error affected the verdict. (*Chandler, supra*, 56 Cal.App.4th at p. 711.) Evidence of Doe's inconsistent statements on other topics was presented to the jury. Moreover, the evidence supporting the jury's verdict was overwhelming, including the testimony by Doe and her sister, the recovered text messages, the medical records, and the testimony of the detectives and the nurse. Accordingly, we also reject appellant's further contention that the trial court's refusal to admit the evidence deprived him of his due process rights.

IV. Any claim of error based on *Griffin v. California* (1965) 380 U.S. 609 (*Griffin*) was forfeited and defense counsel's failure to object did not constitute ineffective assistance of counsel

Appellant claims that the prosecutor committed misconduct by calling attention to appellant's failure to testify at trial, committing so-called *Griffin* error. We find that the charge of misconduct was forfeited by defense counsel's failure to object, but such failure to object did not constitute ineffective assistance of counsel.

Griffin error occurs when the prosecutor comments on the defendant's failure to testify in his defense. In *Griffin, supra,* 380 U.S. at page 615, "'the United States Supreme Court declared that the Fifth Amendment prohibits the prosecutor from commenting, either directly or indirectly, on the defendant's failure to testify in his defense.' [Citation.] This prohibition does not, however, 'extend to comments on the state of the evidence, or on the failure of the defense to introduce material evidence or to call logical witnesses.' [Citation.] Moreover, 'brief and mild references to a defendant's failure to testify, without any suggestion that an inference of guilt be drawn therefrom, are uniformly held to constitute harmless error.' [Citation.]" (*People v. Turner* (2004)

34 Cal.4th 406, 419–420.) Failure to object or seek an admonition forfeits the error on appeal. (*Id*. at p. 420.)

We find guidance in *People v. Turner, supra*, 34 Cal.4th at page 420. In that case, our Supreme Court found that the defendant's failure to object or seek an admonition to the prosecutor's opening statement forfeited the error on appeal. The court also rejected a claim of ineffective assistance of counsel on the basis that the challenged statement did not cause prejudice because it was brief and mild and did not suggest the jury draw an inference of guilt from the defendant's failure to testify. (*Ibid*.) The prosecutor in that case stated: "Well, how did this all come about? How did this happen? And in the first, the prosecution relied pretty much on what I've just told you, *because we did not have access to testimony from the defendants.* But in this first trial Souza testified in his own behalf. He was called by his own lawyer, a guy named Alan Spears. And Souza testified, and because he did so he waived his right to remain silent, and so now we can subpoena him." (*Ibid*.)

Appellant similarly did not make any objection or request an admonition to the challenged statement and therefore has forfeited his claim on appeal. We likewise reject appellant's next claim that defense counsel's failure to object constituted ineffective assistance of counsel. He simply cannot show that his counsel's performance fell below an objective level of reasonableness or that he suffered prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 [to establish ineffective assistance of counsel, the defendant must demonstrate his legal representation fell below an objective standard of reasonableness and prejudice].)

In support of his argument that his counsel was ineffective, appellant contends his trial counsel should have objected to the following statement made during the prosecutor's rebuttal argument: "He brought up inconsistencies about the victim's statements, about police statements, so forth. But there's one thing I didn't hear throughout his discussion with you. What's his story about what happened? He didn't say a single thing about that. What happened that night according to [defense counsel]?

He talks a lot about inconsistencies, doesn't mention any of that, just skips right over hoping you wouldn't wonder what his version of the events were." Our review of the reporter's transcript shows that the statement, when read in context, refers to defense counsel's explanation of events made during closing argument, rather than the defendant's failure to testify.[6] The prosecutor's comments were made in response to defense counsel's closing argument and specifically referred to defense counsel's failure to produce material evidence in support of the defense presented. The prosecutor repeatedly referred to the claims made by defense counsel during closing argument and paraphrased defense counsel's wording.

We are satisfied that appellant has not shown that by failing to object, his trial counsel's performance fell below a reasonable standard. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1339 [*Griffin* does not bar prosecution comments based upon the state of the evidence or upon the failure of the defense to introduce material evidence].) Appellant's trial counsel may well have believed that any objection would have been futile and that as a matter of trial strategy, he would be more effective in advancing his client's cause by making only meritorious objections. (*People v. Kelly* (1992) 1 Cal.4th 495, 520 [generally, failure to object is a matter of trial tactics as to which the Court of Appeal will not exercise judicial hindsight].) Nor can appellant establish prejudice. The

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6 The record shows that the prosecutor argued: "He doesn't tell you in his own words because you can only bend the facts so much before it becomes completely unrealistic and a story that can't be believed. I asked in my initial closing arguments that you maintain sight of the big picture because I didn't want you to get bogged down on the minor details that were really irrelevant. [Defense counsel] wants to highlight them as these gigantic issues because when you fall into that trap, and defense attorneys like to do it, you lose sight of the big picture. [Defense counsel] accuses me of being one-sided. Was anything said by me that was not supported or referenced by evidence? [Defense counsel] points out her injuries. He's telling you to ignore her statement that she said she was assaulted by the police. And because he had explanations for why his client's hands were swollen, we should just leave it at that and assume that his client didn't assault the victim. But did he leave something out during that portion of his discussion with you? He forgot to mention something; right? That his client admits to hitting her. His client told police that three times. He didn't bring that up because that clearly evinces his guilt, his client's guilt, ladies and gentleman."

jury was instructed with CALCRIM No. 355 that appellant had a constitutional right not to testify, with CALCRIM No. 222 that the jury was to consider only the evidence and not to draw any inference from the fact that appellant did not testify, and with CALCRIM No. 104 that the attorneys would discuss the case in their opening statements and closing arguments, but their statements are not evidence. We presume the jurors followed the jury instructions. (*People v. Boyette* (2002) 29 Cal.4th 381, 453.) Furthermore, even had the jury been admonished to disregard the prosecutor's statement, the evidence of appellant's guilt was compelling, and we cannot conclude that it was probable that there would have been a different result. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

V. The jury was properly instructed with CALCRIM No. 220

Appellant contends that CALCRIM No. 220, when considered with CALCRIM No. 222, limits the jury's determination of reasonable doubt to the evidence received at trial and precludes the jury from considering the lack of evidence in determining reasonable doubt. He also contends CALCRIM No. 220 reduces the prosecution's burden of proof to a preponderance of the evidence. Furthermore, he contends that CALCRIM No. 220 deprives defendants of the due process right to be convicted only upon proof beyond a reasonable doubt, and violates due process by failing to advise jurors that the prosecution has the burden of proving each element beyond a reasonable doubt. We agree with the People that appellant forfeited these issues by failing to raise them in the trial court. Moreover, even if the objections had been preserved for appeal, we would reject them.

As previously stated, a party must request appropriate clarifying or amplifying language to preserve a claim of instructional error on appeal. (*People v. Hart, supra*, 20 Cal.4th at p. 622.) Appellant failed to object below and his challenges to the clarity and completeness of the instructions are therefore forfeited on appeal.

Nevertheless, we address appellant's arguments. Appellant urges that CALCRIM No. 220,[7] which provides that the jury must consider "all the evidence that was received throughout the entire trial," when considered together with CALCRIM No. 222,[8] which

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[7] CALCRIM No. 220 as given, provides: "The fact that a criminal charge has been filed against the defendant is not evidence that the charge is true. You must not be biased against the defendant just because he has been arrested, charged with a crime, or brought to trial. [¶] A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty behind a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt unless I specifically tell you otherwise. [¶] Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. [¶] In deciding whether the People have proved their case beyond a reasonable doubt you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty."

[8] CALCRIM No. 222 as given, provides: "You must decide what the facts are in this case. You must use only the evidence that was presented in this courtroom. 'Evidence' is the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I told you to consider as evidence. [¶] Nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case, but their remarks are not evidence. Their questions are not evidence. Only the witnesses' answers are evidence. The attorneys' questions are significant only if they helped you to understand the witnesses' answers. Do not assume that something is true just because one of the attorneys asked a question that suggested it was true. [¶] During the trial, the attorneys may have objected to questions or moved to strike answers given by the witnesses. I ruled on the objections according to the law. If I sustained an objection, you must ignore the question. If the witness was not permitted to answer, do not guess what the answer might have been or why I ruled as I did. If I ordered testimony stricken from the record you must disregard it and must not consider that testimony for any purpose. [¶] You must disregard anything you saw or heard when the court was not in session, even if it was done or said by one of the parties or witnesses. [¶] During the trial, you were told that the People and the defense agreed, or stipulated, to certain facts. This means that they both accept those facts as true. Because there is no dispute about those facts you must also accept them as true. [¶] The court reporter has made a record of everything that was said during the trial. If you decide that it is necessary, you may ask that the court reporter's notes be read to you. You must accept the court reporter's notes as accurate."

defines evidence as "the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I told you to consider as evidence," limits the jury's determination of reasonable doubt to the evidence received at trial and precludes it from considering the lack of other evidence such as DNA evidence or the testimony of other witnesses. We have previously considered and rejected that argument. In *People v. Campos* (2007) 156 Cal.App.4th 1228, 1238, we held that CALCRIM No. 220 does not contravene the rule that "reasonable doubt may arise from the lack of evidence at trial as well as from the evidence presented." Rather, the only reasonable understanding of the language of CALCRIM No. 220 that "[u]nless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty," is that a lack of evidence can lead to reasonable doubt. (*People v. Campos*, *supra*, at p. 1238.)

Appellant's further argument that CALCRIM No. 220 lowers the prosecutor's standard of proof and deprives the defendant of due process has also been rejected and we agree with the reasoning and result of those cases. (*People v. Guerrero* (2007) 155 Cal.App.4th 1264, 1268–1269 [CALCRIM No. 220 does not suggest an impermissible definition of reasonable doubt to the jury; due process is satisfied by CALCRIM No. 220's instructions to consider the evidence and to acquit unless evidence proves defendant's guilt beyond a reasonable doubt]; *People v. Flores* (2007) 153 Cal.App.4th 1088, 1092 [Fourteenth Amendment due process clause protects the accused against conviction except on proof beyond a reasonable doubt as instructed in CALCRIM No. 220].)

Appellant's argument that CALCRIM No. 220 deprives defendants of their federal constitutional due process right by failing to advise jurors that the prosecution has the burden of proving "each ***element***" beyond a reasonable doubt has also been considered and rejected. (*People v. Henning* (2009) 178 Cal.App.4th 388, 406.) In *Henning*, the court held that CALCRIM No. 220, viewed together with other instructions listing the separate elements of the offense correctly informs the jury that the prosecutor was

obliged to prove each element of the crimes beyond a reasonable doubt. (*People v. Henning, supra,* at p. 406.) Similarly, here, the jury was instructed as to the elements of each crime. It was instructed that to prove appellant was guilty of the crimes charged, the People must prove the elements of the offense listed. The jury was also instructed with CALCRIM Nos. 224 and 225 that the People must prove each fact essential to find the defendant guilty beyond a reasonable doubt. We presume the jurors followed the jury instructions. (*People v. Boyette, supra,* 29 Cal.4th at p. 453.)

We are satisfied that CALCRIM No. 220 does not deprive defendants of their federal constitutional right to due process.

VI. There was no cumulative error

Appellant's contention that the cumulative effect of the failure to instruct on reasonable good faith belief in consciousness, the exclusion of limited testimony concerning Doe's prior sexual history, the erroneous reasonable doubt instruction, and the *Griffin* error in closing argument all combined to deprive appellant of a fair trial. Having reviewed each assignment of error and found them lacking in merit and harmless error in any event, we find that it is not reasonably probable the jury would have reached a result more favorable to defendant in the absence of the claimed error. (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 349 [litmus test of cumulative error doctrine is whether the defendant received due process and a fair trial].)

VII. Appellant's sentence violates section 654

Appellant contends that his sentences for count 1, kidnapping and count 8, assault by means likely to produce great bodily injury violate the provisions of section 654 because the evidence established that the kidnapping and assault occurred during a single, indivisible course of conduct motivated by the sole purpose of furthering the goal of sexually assaulting Doe.

Section 654 provides that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the

longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).)

The protection of section 654 has been extended to cases where a single act or omission has occurred, or where there are several offenses committed during a course of conduct deemed to be indivisible in time. (*People v. Le* (2006) 136 Cal.App.4th 925, 931–932.) "It is defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible. [Citations.]" (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) The defendant may be found to have harbored a single intent if the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, resulting in the defendant being punished only once. (*Ibid.*) "If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' [Citation.]" (*Ibid.*) Whether the facts reveal a single objective is a factual matter; the meaning of section 654 is a legal matter. (*People v. Guzman* (1996) 45 Cal.App.4th 1023, 1028.) "A trial court's implied finding that a defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported by substantial evidence. [Citation.]" (*People v. Blake* (1998) 68 Cal.App.4th 509, 512.)

The trial court ordered the sentences in counts 3, 4, 5, 6, and 7 be served consecutively to the sentence in count 1, kidnapping, because they were motivated by different purposes, constituted separate acts, and that "there was an opportunity for [appellant] to reflect upon his actions" between the acts. With respect to count 8, assault by means likely to produce great bodily injury, the trial court denied probation and ordered that the sentence be served concurrently to counts 1 through 7. We find that count 1, kidnap, and count 8, assault, were committed for the purpose of facilitating the sexual assaults. (See, e.g., *People v. Latimer* (1993) 5 Cal.4th 1203, 1217 [defendant who drove his victim into the desert and raped her could not be punished for both

kidnapping and rape since the sole purpose of the kidnapping was to facilitate the rape].) The evidence shows that appellant noticed that Doe was alone and feeling ill. He attempted to strike up a conversation with her and offered her a seat in his car. When she rebuffed his advances, he hit her. He continued to beat her into unconsciousness, then put her in his car. He then drove away with her to a motel where he was able to perpetrate his sexual assaults. The evidence does not suggest that appellant had any intent or objective behind the assault and kidnapping other than to commit the sexual assaults upon Doe.

As such, the court's imposition of sentence on both counts 1 and 8 was error.

DISPOSITION

The judgment is ordered modified to stay execution of sentence on count 8 pursuant to section 654. The trial court is ordered to send a corrected abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ